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June 11, 2015

Hon. Susan M. Collins
413 Dirksen Senate Office Building
Washington, DC 20510

Hon. Angus S. King, Jr.
359 Dirksen Senate Office Building
Washington, DC 20510

Hon. Chellie Pingree
1318 Longworth House Office Building
Washington, DC 20515

Hon. Bruce Poliquin
426 Cannon House Office Building
Washington, DC 20515

Dear Senator Collins, Senator King, Congresswoman Pingree and Congressman Poliquin:

Attorneys General from both parties have raised serious concerns about provisions of the trade agreements the United States Trade Representative is negotiating. Idaho Attorney General Lawrence Wasden and I met with Ambassador Froman recently and arranged for several telephone conferences with him and other Attorneys General. Despite these conferences, I remain unconvinced that our specific concerns are being addressed.

As you prepare to vote on the "TPA" or "Fast Track" legislation, I want to share those concerns with you. Bluntly, I am troubled by the potential for some provisions of the trade agreements to interfere with the responsibility of Attorneys General to enforce the laws and to protect the public. Current trade negotiations surrounding the "TPP," the "T-TIP" and the "TISA" focus on revising and standardizing regulatory measures, raising concerns that these agreements may undermine our work and harm our citizens.

INVESTOR-STATE DISPUTE SETTLEMENT ("ISDS") PROVISIONS

My primary concern as your Attorney General is the danger of ISDS in the pending trade agreements. ISDS allows foreign corporations to pursue claims without regard to the settled regulatory policies of our states and the federal government. ISDS arbitrations can reach results that neither of the governments involved would support and that may fly in the face of the established position of those governments. These dispute resolution mechanisms exist entirely outside our legal systems and are conducted under standards that are very different from those applied in our courts. Inherent flaws in the ISDS system include:

- Use of private persons who rotate between being advocates and being judges, with none of the independence that we require of judges in American tribunals.
- No established body of law and no requirement to adhere to precedent so that parties might rely on the results in future cases.

- No appellate review process to ensure uniform application of principles over time.
- Ability of investors to forum shop between ISDS and domestic legal systems, even allowing an ISDS panel to overturn a decision of a court of law which would otherwise bind domestic investors.

ISDS was initially intended to protect American investors in less well-developed legal systems that might not provide an unbiased forum and due process for American companies. That rationale no longer holds water, as ISDS is being proposed in negotiations with countries that have fully functional legal systems.

In my view, the most appropriate course would be to eliminate ISDS provisions entirely in the pending agreements. At a minimum, there should be a full, open and public debate on ISDS. The European Union has begun that process, asserting that “Negotiations with the US [on this issue] will not begin until these discussions are completed and proposals from the public on how to improve investor protection and ISDS are implemented.” It seems to me, the citizens of the United States are entitled to similar consideration.

Some specific examples of my concerns follow:

Tobacco: The Attorneys General and the federal government have led the fight to reduce smoking. The 1998 Master Settlement Agreement restricted marketing tobacco to children. State and local laws regulate tobacco through licensing, taxation, minimum age requirements, fire safety standards, and much more. The Food and Drug Administration sets packaging and labeling requirements and limits additives. All of these restrictions are subject to possible challenges by foreign governments and, more troubling, by individual investors under ISDS provisions.

Challenges to tobacco regulations have been brought under existing trade agreements, ranging from Indonesia’s attack on the federal ban on clove cigarettes, to an ISDS attack on the MSA regulations for tobacco manufacturers and other ISDS attacks on “plain packaging” legislation in other countries. All of these challenges have required governments to expend substantial resources to defend measures that their countries have chosen to enact as part of a worldwide effort to reduce tobacco use.

Tobacco regulations should not be subject to ISDS. A private foreign investor should not be able to use trade agreements to challenge regulations that both its home government and the foreign government impose on their domestic tobacco companies – yet that is precisely what can be done under ISDS. At a minimum, if tobacco regulation is not fully carved out of pending trade agreements, it needs to be excluded from any ISDS provisions in those agreements.

Predatory Lending: The Attorneys General have been in the forefront of protecting homeowners against the financial abuses that led to the 2008 financial crisis. The protections of the National Mortgage Settlement and associated federal and state laws and regulations are at risk under provisions of prior trade agreements that are the model for current negotiations. ISDS arbitration panels could interpret non-discriminatory restrictions on predatory or toxic financial products, enacted to reduce the likelihood of

another financial crisis, as limiting a foreign corporation's market access. Challenges could also be brought against restrictions on the size or conduct of financial firms that are designed to protect depositors' money from high-risk trading. ISDS arbitration panels' entertaining of violations of a "minimum standard of treatment" opens up a wide range of challenges to consumer protection regulations on the basis that they interfere with a foreign company's profit expectations, even if the American judicial system would uphold those same regulations.

Professional Licensing Standards: Some provisions in trade agreements seek to help individuals to obtain professional certifications in foreign jurisdictions. The Conference of Chief Justices, representing the state courts across the country, are concerned about the potential for such agreements to interfere with state courts' regulation of the admission and performance of lawyers in their jurisdictions. I too believe that the United States Trade Representative should not negotiate provisions giving foreign individuals and corporations greater substantive and procedural rights than those which United States citizens and businesses have.

There are a number of other concerns ranging from the specifics of environmental protection, intellectual property and patent standards, and health inspection standards for imported food, to the broad standards for "regulatory cooperation" currently being discussed.

NEED FOR TRANSPARENCY

The European Union has agreed that greater transparency is needed and, as of January 2015, it began releasing the actual text of its proposals. As EU Commissioner for Trade Cecilia Malmström said, "It's important that everyone can see and understand what we're proposing in TTIP and – just as importantly – what we're not." The United States owes its people the same degree of transparency, allowing us to make sure any agreement maintains the integrity of our existing health and safety, consumer protection, labor and environmental regulations, while ensuring that all countries compete on a level playing field. Transparency in the negotiating process will enhance the odds of passage of the agreements, not diminish those odds.

It is important that the United States become a good trading partner with the European Union and with countries around the Pacific Rim. It is important that treaties be forcefully negotiated and respected, with the interests of our national economy in the forefront. These negotiations, however, should be conducted transparently and without risk to the important public health and safety interests embodied in decades of state and federal laws. Our citizens expect no less. Thank you.

Very truly yours,



Janet Mills
Attorney General